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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 713

JOE TENNER,
Petitioner,

vs.

CHARLES W. DULLEA, Chief of Police of the City and County of San Francisco,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the Superior Court of the State of California, in and for the City and County of San Francisco.

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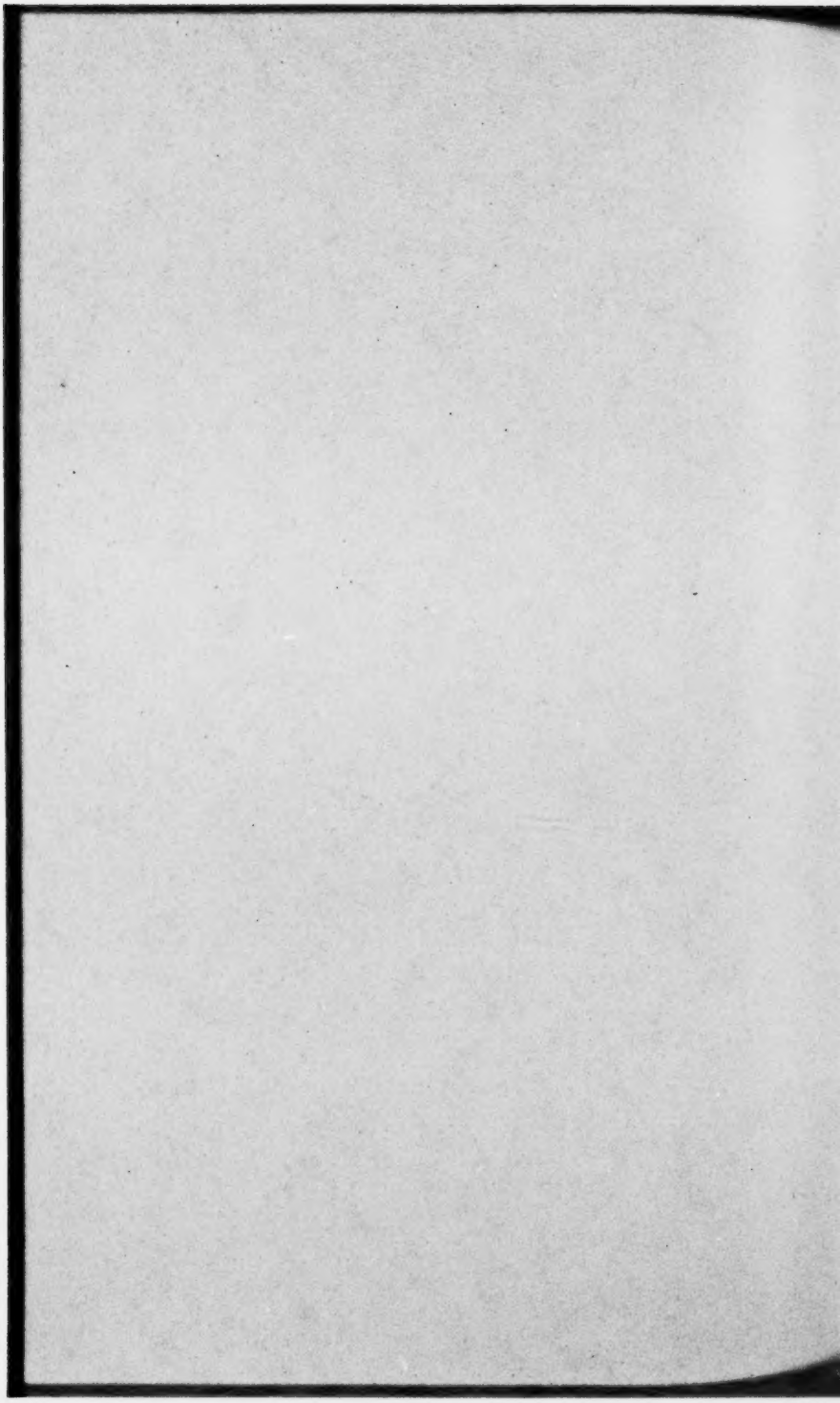

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PETITION FOR WRIT OF CERTIORARI

to the Superior Court of the State of California, in and for the City and County of San Francisco.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Joe Tenner for a Writ of Certiorari to the Superior Court of the State of California, in

and for the City and County of San Francisco, respectfully shows to Your Honors:

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Your Petitioner, imprisoned by the respondent, Chief of Police of the City and County of San Francisco, State of California, sued out a Writ of Habeas Corpus in the Superior Court of the said City and County. The respondent made return to the Writ (Typewritten Transcript p. 9), setting forth that he held petitioner in custody on telegraphic instructions received from the Chief State Parole and Probation Officer for the State of Washington, it being alleged that petitioner had been convicted in the latter State and sentenced to a term of imprisonment in the penitentiary, that thereafter he had been granted parole, that said parole had been subsequently revoked by the Washington Board of Prison Terms and Paroles, and that petitioner was wanted in the State of Washington for violation of his parole from the Washington State Penitentiary.

Petitioner duly filed exceptions to the sufficiency of the return (Typewritten Transcript p. 12) upon the following grounds, among others:

"II.

That it appears on the face of the said return that the said Joe Tenner is not imprisoned or detained by virtue of any warrant, process, judgment, commitment or order of any Court of this State, or of the United States, or of any judge or judicial officer, or

of any executive officer of this State or of the United States.

III.

That it appears on the face of the said return that the said Joe Tenner is imprisoned and detained, and is restrained of his liberty upon the sole basis of telegraphic advices and instructions, and upon hearsay information received by the said Chief of Police.

IV.

That it does not appear from the said return that any demand or requisition for the arrest of the said Joe Tenner, or his delivery to any agent of the State of Washington, has been demanded or requested by the Governor, or other executive authority of Washington, of the Governor of the State of California, or that the Governor of the State of California has issued any warrant, or other process, for the arrest of the said Joe Tenner.

V.

That it does not appear from the said return that the said Joe Tenner has ever violated the terms of any parole imposed upon him in or by the State of Washington.

VI.

That no copy of any indictment found, or any affidavit charging the said Joe Tenner with any crime against the State of Washington, as provided by the Act of Congress (U. S. C. A., Title 18, Sec. 662) is set forth in said return.

VII.

That it appears on the face of said return that the said Joe Tenner is deprived of his liberty, and is imprisoned and restrained of his liberty in violation of Article 2, Section 2, Clause 2, of the Constitution of the United States.

VIII.

That it appears on the face of the said return that the said Joe Tenner, by virtue of the said imprisonment, is deprived of his liberty, without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States."

The matter was heard on the exceptions to the sufficiency to the return, and the Court, after argument, *without any written opinion,* made an order denying the writ. (Typewritten Transcript p. 15.) Under the Constitution of the State of California (Sec. 5, Article VI), Superior Courts have power to issue writs of habeas corpus on petition by, or on behalf of, any person in actual custody in their respective counties. In this they excercise concurrent jurisdiction with the Supreme Court and the District Courts of Appeal, and their judgments either granting or denying the writ are not appealable or subject to review by any other Court in any manner.

In re Hughes, 159 Cal. 360, 113 Pac. 684;
In re Zany, 164 Cal. 724, 130 Pac. 710;
In re Bruegger, 204 Cal. 169, 267 Pac. 101;
In re Cunha, 123 Cal. App. 625, 11 Pac. (2d) 902.

No pretense was made by the respondent that any extradition proceedings for the return of petitioner to the State of Washington had been instituted or that any attempt had been made to comply with the provisions of the Act of Congress (U. S. C. A., Title 18, Sec. 662), which prescribes the procedure necessary to secure the rendition of an alleged fugitive from justice. It was the contention of respondent that petitioner could be returned to the State of Washington as a parole violator without any extradition proceedings whatsoever by virtue of a certain compact between the State of Washington and the State of California authorized by an act of the California Legislature entitled "Uniform Act for Out-of-State Parolee Supervision" (Statutes 1937, p. 469, Deering's General Laws, 1937, Vol. II, p. 2732), the material portions of which are as follows:

> "(3) *Retaking probationers or parolees.* That duly accredited officers of a sending state may at all times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. *All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of States party hereto, as to such persons.* The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State. If at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should

be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense.

(4) *Transportation of persons retaken.* That the duly accredited officers of the sending State will be permitted to transport prisoners being retaken through any and all States parties to this compact, *without interference.*" (Italics ours.)

Section 2 of the Act recites that pursuant to the authority vested in the State by a certain act of Congress, the Governor is authorized and directed to enter into a compact or compacts on behalf of the State with any of the United States legally joining therein.

The Act of Congress relied upon (U. S. C. A., Title 18, Sec. 420) reads:

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts." (June 6, 1934, c. 406, Statute 909.)

It was the contention of petitioner that this Act of the State of California was invalid because repugnant to the provisions of Article II, Section 2, Clause 2, of the Constitution of the United States and to the due process of law clause of the 14th Amendment to the Constitution of the United States and to the

Act of Congress of 1793. (U. S. C. A., Title 18, Sec. 662.)

Thus the question to be determined by this honorable Court is whether a State by compact with another State can permit the latter's officers to come into its territory and arrest a person residing therein and remove him therefrom without compliance or attempted compliance, with the Federal constitutional and statutory provisions relative to interstate extradition, without abridging his privileges and immunities and without depriving him of his liberty without due process of law.

STATEMENT PARTICULARLY DISCLOSING THE BASIS UPON WHICH IT IS CONTENDED THAT THIS COURT HAS JURISDICTION TO REVIEW THE JUDGMENT IN QUESTION.

A. The statutory provisions believed to sustain the jurisdiction are U. S. C. A., Title 18, Section 662; Section 237 of the Judicial Code; U. S. C. A., Title 28, Section 344, subdv. (b).

B. The date of the judgment of the State Court sought to be reviewed—October 17, 1941. This judgment, as previously shown, is final and not subject to review by appeal or otherwise by any other Court of the State of California.

C. That the nature of the cause of the rulings of the State Court were such as to bring the case within the jurisdictional provisions relied upon is sufficiently set forth in the preceding summary statement of the matter involved and from the certificate of the judge

of the State Court. (Typewritten Transcript p. 19.) As previously stated, the State Court denied the writ of habeas corpus without opinion, but the certificate sets forth that the validity of the statute of the State of California was drawn in question on the ground of its being repugnant to the Constitution and laws of the United States.

D. The cases believed to sustain the jurisdiction are in part as follows:

Prigg v. Pennsylvania, 16 Pet. 529, 10 Law. Ed. 1060;

Kentucky v. Dennison, 24 Howard 104, 16 Law. Ed. 728;

Mahon v. Justice, 127 U. S. 700, 32 Law. Ed. 283;

Lascelles v. Georgia, 148 U. S. 537, 37 Law. Ed. 549;

Hyatt v. New York, 188 U. S. 691, 47 Law. Ed. 657;

Innes v. Tobin, 240 U. S. 127, 60 Law. Ed. 562.

STATEMENT OF THE GROUNDS UPON WHICH IT IS CONTENDED THE QUESTIONS INVOLVED ARE SUBSTANTIAL.

1. "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states."

Constitution of the United States, Article IV, Sect. 2.

Among these are:

"The right of a citizen of one state to pass through or *reside in any other state* for purposes of trade, agriculture, professional pursuits, or otherwise; *to claim the benefit of the Writ of Habeas Corpus;* etc."

Corfield v. Coryell (C. C. Pa.), 4 Wash. (U. S.) 271, 6 Fed., Cas. No. 3230;

Slaughter House Cases, 16 Wall. 97, 21 Law. Ed. 394.

2. In conformity with this constitutional provision, any person coming into a State has the right to remain there unless and until he is lawfully removed to another State on the demand of the executive authority thereof for a crime committed therein and from whose justice he has fled. The State cannot expel him. Banishment is not a punishment sanctioned by the law of this country.

"It is prohibited by public policy as tending to incite dissension among states, provoke retaliation and disturb that fundamental equality of political rights among the several states which is the basis of the Union."

People v. Baum, 251 Mich. 187, 231 N. W. 95, 70 A. L. R. 98.

3. It is well settled in a multitude of decisions, both State and Federal, *that the matter of interstate extradition is governed solely and exclusively by the Federal Constitution and laws.* It was intended by the provision of the Federal Constitution (Art. II, Sect. 2, Clause 2) to fully embrace the subject and

the provisions of the Act of 1793 are controlling, and exclusive of State power.

Innes v. Tobin, 240 U. S. 127, 60 Law. Ed. 562;
Kentucky v. Dennison, supra;
Lascelles v. Georgia, supra.

> *"No person can or should be extradited from one state to another unless the case falls within the constitutional provision, and the power which independent nations have to surrender criminals to another nation as a matter of favor or comity is not possessed by the states."*
>
> *People ex rel. Corkran v. Hyatt,* 172 N. Y. 176, 64 N. E. 825, 60 L. R. A. 774;
>
> *Affirmed in Hyatt v. New York,* 188 U. S. 691, 23 S. Ct. 456, 47 Law. Ed. 657.

The power of interstate extradition cannot be exercised by the chief executive of a State on the ground of comity or public policy. Not only the power but the matter of its exercise is based exclusively on the Constitution of the United States and the law of Congress passed in pursuance thereof.

Ex parte Morgan, 20 Fed. 298, 301.

The Act of 1793 provides:

> "Whenever the executive authority of any state or territory demands any person as a fugitive from justice of the executive authority of any state or territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of any state or territory, charging the person demanded with having committed treason, felony, or other crime,

> certified as authentic by the Governor or Chief Magistrate of the state or territory from which the person so charged has fled, it shall be the duty of the executive authority of the state or territory to which such person has fled to cause him to be arrested and secured, etc."

It is the rule, recognized without dissent in all of the decisions, that no person can be extradited from one State to another unless he be a fugitive from the justice of the demanding State, and that he be substantially charged with some crime known to the law in the demanding State, which is a question of law which is always open upon the face of the papers to judicial inquiry upon an application for discharge under a writ of habeas corpus.

Roberts v. Reilly, 116 U. S. 95.

It must be made to appear that the alleged fugitive was within the demanding State physically, and not constructively merely, at the time of the commission of the offense with which he stands charged.

Hyatt v. New York, supra;

State v. Hall, 115 N. C. 8, 20 S. E. 729, 28 L. R. A. 289;

In re Whittington, 34 Cal. App. 344, 167 Pac. 404.

Moreover, an alleged fugitive cannot be rendered up unless he be charged with a crime in the demanding State by an indictment which sufficiently charges a crime (*People ex rel. Lawrence v. Brady,* 56 N. Y. 182), or by an affidavit on oath certain and not on information or belief (*Ex parte Spears,* 88 Cal. 640,

26 Pac. 608), before an officer having the status of a magistrate. (*Ex parte Owen,* 10 Okl. Cr. 284, 136 Pac. 137.)

4. In view of the settled rule that an alleged fugitive can only be rendered up pursuant to the Constitution and laws of the United States, we submit that the compact between the States of California and Washington, which is the only law invoked by respondent as justification for holding petitioner, is unconstitutional and void. The statute permits an officer from one State to go into another and without any extradition proceedings whatsoever, without any demand of the executive authority of the sending State, without any warrant of the Governor of the aslyum State, and without any formalities other than the presentation of his own credentials, arrest any person alleged to be a parole violator and remove him to the sending State "without interference", which means, of course, without the right to appeal to the Courts of the State in which the prisoner resides and in deprivation of his right to invoke the writ of habeas corpus. We submit that if two States should enter into such a compact with reference to stray dogs, no Court would hold that a pound-master from one State could enter another State and take a dog out of the possession of one residing therein without according to the latter a judicial hearing. Is the right of a human being to his liberty of less moment than the right of property in an animal?

5. The rule that a parole violator is a fugitive from justice and therefore subject to extradition is a

false quantity. Even a violator of parole can only be extradited from one State to another by regular extradition proceedings, and this is recognized by the Supreme Court of the State of Washington.

State ex rel. Tresedor v. Remann, 4 Pac. (2d) 866, 78 A. L. R. 412.

6. Admittedly, neither this nor any other compact relative to parole violators, or, indeed, to any other subject, could be entered into without the consent of Congress.

Constitution of the United States, Art. I, Sect. 10, Clause 3.

The Act of Congress relied upon (Act of June 6, 1934, c. 406, Statute 909) and which is drawn in the most general and uncertain terms, *does not purport or pretend to authorize any State to surrender any person within its jurisdiction to another State by any proceedings other than legal extradition proceedings had in accordance with the Act of 1793.* We submit that the contentions of petitioner that the statute of the State of California in question is an illegal compact with another State which violates the provisions of Article II, Section 2, Clause 2, of the Constitution of the United States, and that the act is a deprivation of due process of law, are substantial Federal questions.

THE STAGE OF THE PROCEEDINGS AND THE MANNER IN WHICH THE FEDERAL QUESTIONS WERE RAISED.

These matters are set forth with appropriate reference to, and quotations from the record, in the fore-

going summary statement of the matter involved, and restatement of the same is omitted in the interest of brevity.

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The State Court has decided a Federal question of substance not heretofore specifically determined by this Court, in a manner not in accord with the applicable decisions of this Court for the reasons heretofore stated under the heading of the grounds upon which it is contended that the questions involved are substantial. Restatement of what we said under that heading is omitted in the interest of brevity.

The question is a novel one and is obviously a constitutional question of great importance for the reason that while more than half the States have entered into similar compacts, the constitutionality of the statute here challenged, and of like or similar statutes, has not been determined by this Court or by any other Court, State or Federal, in which any written opinion has been filed or which appears in any of the reports, either State or Federal.

The constitutionality of such legislation, involving as it does the power of the States to make compacts for the rendition of alleged violators of law other than in accordance with the Constitution of the United States (Article II, Section 2, Clause 2) and the act of Congress in aid thereof, ought, we submit, to be determined once and for all by this Court. Such legislation is in derogation of liberty, and should not be sustained.

In view of the contentions heretofore made and the authorities cited, we deem a supporting brief unnecessary to the consideration of this petition, and forbear its presentation in the interest of brevity.

Wherefore, your petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the honorable judges of the Superior Court of the State of California, in and for the City and County of San Francisco, commanding them to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record of all proceedings in the cause entitled as above; and that the judgment of said Superior Court may be reviewed by Your Honors and the judgment thereof reversed; and that your petitioner have such other and further relief as to this Honorable Court shall seem meet, just and proper in the premises; and your petitioner will ever pray.

Dated, San Francisco, California,
October 22, 1941.

WILLIAM KLEIN,
WILLIAM F. HERRON,
Attorneys for Petitioner.

CERTIFICATE OF COUNSEL

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am of counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law, as well as in fact, and that said petition is not interposed for delay.

Dated, San Francisco, California,
October 22, 1941.

WILLIAM KLEIN,
Of Counsel for Petitioner.

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No. 713

JOE TENNER,
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vs.

CHARLES W. DULLEA, Chief of Police of the City and County of San Francisco,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI to the Superior Court of the State of California, in and for the City and County of San Francisco.

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

to the Superior Court of the State of California, in and for the City and County of San Francisco.

SUMMARY OF PROCEEDINGS.

Petitioner has filed with this Court an application for a writ of certiorari directed to the Superior Court of the State of California, in and for the City and

*NOTE: All italics are by the writer unless otherwise indicated.

County of San Francisco. The petition springs from an order of remand and refusal of discharge on a petition for a writ of habeas corpus, filed in said Superior Court.

It appears from the return to the writ, petitioner was sentenced to Washington State Penitentiary on March 15, 1938 for the commission of a felony, namely, living with and accepting the earnings of a prostitute, by the courts of said State for a period not exceeding five years; that on March 14, 1940 petitioner was paroled from said institution; that on the 11th day of August, 1941, the Board of Prison Terms and Paroles of said State revoked said parole for cause, ordering the return of petitioner to said State prison; that upon telegraphic instructions from the Chief Parole and Probationer Officer of said State he was taken into custody by the police of San Francisco to await the arrival of officers from the State of Washington to return him to said State. (R. 4, 5.) Petitioner thereupon filed the petition for said writ of habeas corpus from the decision of which this proceeding is taken.

The procedure followed by the authorities of the State of Washington to secure the return of petitioner as a parolee, whose parole had been revoked, is set forth in an interstate compact adopted by the legislature of the State of California in 1937, material paragraphs of which are hereafter quoted. (California Statutes 1937, page 469; Deering's General Laws 1937, Volume II, page 2732.)

This statute was enacted under the authority of the Congressional consent act adopted by Congress June

6, 1934 (Ch. 406, Stats. 1909; U.S.C.A. Title 18, section 420) hereafter set forth.

Petitioner contends the foregoing legislation is in violation of the due process clause and of Article IV,* Section 2, Clause 2 of the Federal Constitution.

It is the contention of respondent that this Court has no jurisdiction to entertain the petition on certiorari because,

(a) Petitioner has not exhausted his remedy in the court of last resort of the State of California;

(b) It does not sufficiently appear a federal question was raised in the State court;

(c) The petition does not present a substantial federal question to this court;

(d) The legislation under which it was sought to return petitioner as a parolee to the State of his conviction and sentence violates no provision or prohibition of the Federal Constitution.

I.

THIS COURT WILL NOT ASSUME JURISDICTION FOR REVIEW OF THE PETITION ON CERTIORARI HEREIN—PETITIONER HAS NOT EXHAUSTED HIS REMEDY IN THE COURT OF LAST RESORT OF THIS STATE.

It has been repeatedly declared by this Court that it will not entertain a petition of the character here disclosed until the petitioner has exhausted whatever remedy he may have in the highest court of the State

*Reference to Article II by petitioner is an apparent error.

in which the proceedings originated, and until such court has acted thereon.

> *Mooney v. Holohan,* 294 U.S. 103, 115:
>
> "We do not find that petitioner has applied to the state court for a writ of *habeas corpus* upon the grounds stated in his petition here. That corrective judicial process has not been invoked and it is not shown to be unavailable. Despite the many proceedings taken on behalf of the petitioner, an application for the prerogative writ now asserted to be peculiarly suited to the circumstances disclosed by his petition has not been made to the state court. Orderly procedure, governed by principles we have repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus,* in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State may still remain open. *Davis v. Burke,* 179 U. S. 399, 402; *Urquhart v. Brown,* 205 U. S. 179, 181, 182; *U. S. ex rel. Kennedy v. Tyler,* 269 U. S. 13, 17. See, also, *Bryant v. Zimmerman,* 278 U. S. 63, 70."

See, also:

> *Appleyard v. Massachusetts,* 203 U. S. 222;
> *Clarke v. McDade,* 165 U. S. 169;
> *U. S. C. A. Title 28, section 344* (b).

The petition is directed to the Superior Court at San Francisco, an inferior court of this State; the petition is based upon the order of said court denying petitioner's discharge on habeas corpus, upon hearing thereon. The highest court of the State of California is the Supreme Court; the next in order of dignity

are the District Court of Appeal and the Superior Court. Each of said courts have the power by express constitutional grant to issue original writs of habeas corpus. (California Constitution, Article VI, sections 1, 4, 4b, 5.)

With reference to the Supreme Court, the pertinent parts of section 4 of Article VI of the State Constitution relating to the issuance of writs of habeas corpus provide:

> "* * * The said court shall also have power to issue writs of mandamus, certiorari, prohibition, and *habeas corpus,* and all other writs necessary or proper to the complete exercise of its appellate jurisdiction. Each of the justices shall have power to issue writs of habeas corpus to any part of the state, upon petition by or on behalf of any person held in actual custody, and may make such writs returnable before himself or the supreme court or before any district court of appeal, or before any justice thereof, or before any superior court in the state, or before any judge thereof."

Successive applications for such writs may be made by the petitioner in each of said courts. The petitioner, upon denial of a discharge on the petition for writ of habeas corpus filed in the Superior Court, could have filed a petition for the same relief upon the same grounds in the District Court of Appeal or the Supreme Court, or in both, in the order of their dignity.

Matter of Perkins, 2 Cal. 424;

Penal Code, section 1475.

In the *Matter of Zany,* 164 Cal. 724, at page 727 it was said, in this connection:

> "* * * Where a petitioner was remanded to custody by a superior court, and the proceeding instituted in that court was thus terminated and was no longer a matter *pending therein,* he could inaugurate a *new proceeding* for relief in another court and can still do so, but is now limited in the making of a new application by statutory provision to a higher court, either the district court of appeal having jurisdiction, or the supreme court. Such was the only remedy afforded by our law to the petitioner when remanded, and, as we have said, a discharge from custody by a superior court was final and conclusive." (Italics by court.)

Section 1475, Penal Code (California Statutes 1907, page 560) recognizes the right of the petitioner on an order of remand in an inferior court to file a new petition in the Supreme Court of this State. The statute simply regulates the procedure in relation to its form and content. A material portion of said section reads as follows:

> "Every application for a writ of habeas corpus must be verified, and shall state whether any prior application or applications have been made for a writ in regard to the same detention or restraint complained of in the application, and if any such prior application or applications have been made the later application must contain a brief statement of all proceedings had therein, or in any of them, to and including the final order or orders made therein, or in any of them, on appeal or otherwise."

While it is true a petitioner, on habeas corpus, may not appeal from an order of remand, he may never-

theless, as indicated, file a petition in the Supreme Court, which petitioner has not done, and until he has filed such petition in the Supreme Court of this State and an adverse decision thereon is rendered, he has no standing on certiorari in this Court.

II.

IT DOES NOT SUFFICIENTLY APPEAR THAT A FEDERAL QUESTION WAS RAISED IN THE STATE COURT.

It does not appear a federal question was properly raised in the State court. A mere general statement in the petition for a writ of habeas corpus filed in the State court that petitioner was taken into custody without due process is insufficient. (R. 2.) Moreover, the police of the State had the power to make the arrest of petitioner without any warrant of arrest.

Stallings v. Splain, 253 U. S. 340;
Burton v. New York Central R.R. Co., 245 U. S. 315, 318;
Day v. Keim, 2 Fed. (2d) 966.

Nor can the certificate of the judge to the record suffice, which simply states certain enumerated constitutional questions were raised, without evidence the same were raised in the pleadings and the hearing of the cause.

Seaboard Air Line Ry. v. Duvall, 225 U. S. 477;
Home for Incurables v. City of New York, 187 U. S. 155;
Henkel v. Cincinnati, 177 U. S. 170.

Nor is it sufficient they were raised in the exceptions to the order or judgment.

Clarke v. McDade, 165 U. S. 168, 172.

III.

THE APPLICATION OF PETITIONER FOR A WRIT OF CERTIORARI DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

This Court may not assume jurisdiction to review the decision of a State court in the absence of a substantial federal question.

Honeyman v. Hanan, 300 U. S. 14, 18;
Whitney v. California, 274 U. S. 357, 360;
Zucht v. King, 260 U. S. 174;
Sugarman v. United States, 249 U. S. 182, 184.

The entry into an asylum State by the officers of another State, under an interstate compact, such as the one here involved, for the purpose of seizure and return of a parolee whose parole has been revoked, is not fundamentally a matter of federal concern. For the protection of its citizens and the enforcement of its penal laws a State has the sovereign right under its reserved police powers to expel from its boundaries criminals or fugitives from justice from another State, without the consent of Congress.

Matter of Perkins, 2 Cal. 424, 436.

The interstate compact under which it was sought to return petitioner to the State of Washington is a reasonable exercise of the police powers of this State,

made necessary for the more effective enforcement of its penal laws. Article I, Section 10, Clause 3 of the Federal Constitution is not applicable to the interstate compact here under consideration; the consent of Congress is required only, notwithstanding the congressional act of June 6, 1934, Chapter 406, Statutes 909, to those interstate compacts which may impinge upon the supremacy of the United States or invade its exclusive domain.

St. Louis and San Francisco Ry. v. James, 161 U. S. 540, 562;
Wharton v. Wise, 153 U. S. 155, 168-170;
59 *Corpus Juris,* page 37, section 13-b.

After holding that the Constitution does not apply to every interstate compact; that there are such as require no congressional consent, this Court in *Virginia v. Tennessee,* 148 U. S. 503, at page 519, said:

> "Looking at the clause in which the terms 'compact' or 'agreement' appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. * * *"

The consent by Congress to the enactment of the California statute, Statutes 1937, page 469, under which the return of the petitioner was sought, did not make the California statute a treaty or statute of the United States.

Hinderlider v. La Plata Co., 304 U. S. 93, 109;
People v. Central Railroad, 12 Wall. 455.

Indeed, the rights and powers reserved to the states under the Tenth Amendment to the United States Constitution included the right to enter into interstate compacts which did not contravene provisions of the Federal Constitution, although such compacts may limit the agreeing states in the exercise of their respective police powers.

United States v. Bekins, 304 U. S. 27, 52.

Nor are interstate compacts for that reason invalid.

Green v. Biddle, 21 U. S. 1.

A parolee is a convict released from imprisonment under certain conditions; the revocation of his parole renders him a fugitive from justice. His rearrest without warrant is not a violation of due process of law.

Ex parte Foster, 61 Pac. (2d) 37, 39.

Upon the revocation of the parole of petitioner there would be no question as to the right of the State of Washington to arrest him, without warrant, within its own boundaries without violating the Federal Constitution. Upon the consent of the State of California, it is difficult to understand why a different rule should apply; that is to say, why the consent of Congress must first be obtained before officers of the State of Washington may arrest petitioner within the boundaries of the State of California. It is an act committed within the State of California affecting the enforcement of its own criminal laws and solely a matter of State concern. To grant such consent to the State of Washington to seize a fugitive from

justice within this State under the circumstances here disclosed is but a reasonable exercise of the police powers of this State.

Waters-Pierce Oil Co. v. Texas (No. 1), 212 U. S. 86;

Zucht v. King, supra.

IV.

THE CONGRESSIONAL ACT ENABLING THE STATES TO ENTER INTO COMPACTS IN THE ENFORCEMENT OF THEIR PENAL LAWS, AND THE CALIFORNIA STATUTE ENACTED THEREUNDER, ARE VALID AND VIOLATE NO FEDERAL CONSTITUTIONAL PROVISION.

Assuming the Federal Constitution has been drawn into question by the legislation mentioned in the above caption, still such legislation does not deny any constitutional right or guarantee.

The pertinent parts of the California statute under consideration read:

> "Pursuant to the authority vested in this State by that certain act of Congress, approved June 6, 1934, and entitled, 'An act granting the consent of Congress to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime, and for other purposes', the Governor is hereby authorized and directed to enter into a compact or compacts on behalf of this State with any of the United States legally joining therein."

Subdivision (3) of paragraph 3 of said statute reads:

> "*Retaking probationers or parolees.* That duly accredited officers of a sending State may at all

times enter a receiving State and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from Justice are hereby expressly waived on the part of States party hereto, as to such persons. The decision of the sending State to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving State. If at the time when a State seeks to retake a probationer or parolee there should be pending against him within the receiving State any criminal charge, or he should be suspected of having committed within such State a criminal offense, he shall not be retaken without the consent of the receiving State until discharged from prosecution or from imprisonment for such offense."

(Statutes 1937, page 469; Deering's General Laws, Volume II, page 2732.)

The congressional consent act under which the foregoing statute was enacted reads:

"The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts."

(June 6, 1934, c. 406, 48 Stat. 909; U. S. C. A. Title 18, section 420.)

The foregoing congressional consent act was enacted pursuant to the provisions of Article I, Section 10, Clause 3 of the Federal Constitution:

> "No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay."
>
> (U. S. C. A., Part 2, page 218.)

At the outset permit us to call to the attention of this Court the fact that upon numerous occasions it has upheld and enforced interstate compacts involving the enforcement of both civil and criminal process, a few of which are here cited:

New Jersey v. Delaware, 291 U. S. 361, 377, 378;
Miller v. McLaughlin, 281 U. S. 261;
Nielson v. Oregon, 212 U. S. 315;
St. Louis and San Francisco Ry. v. James, supra, p. 562;
Wharton v. Wise, supra;
134 A. L. Rep. 1411.

The congressional consent act enacted under the authority of Article I, Section 10, Clause 3 of the Federal Constitution does not violate Article IV, Section 2, Clause 2 of said Constitution, the so-called constitutional extradition provision. This extradition or rendition provision is not self-executing; it was left to Congress to prescribe the proceedings necessary to carry the provisions of the article into effect.

Roberts v. Reilly, 116 U. S. 80, 94;
Kentucky v. Dennison, 24 How. 66, 104.

The aim of the constitutional provision was to prevent the successful escape of persons charged with, or convicted of, the commission of crime by fleeing the boundaries of the State where they were charged or convicted.

Ex parte Anthony, 87 Pac. (2d) 302.

No comity exists between the States for the rendition of fugitives from justice.

Mahon v. Justice, 127 U. S. 700.

The constituted authorities of one State could not pursue a fleeing felon into another State in the absence of the consent of the asylum State, without committing a breach of its sovereignty; hence these federal rendition laws. If, as indicated, the duty rested with Congress to prescribe the requisite procedure to carry into effect this constitutional provision, it must follow its character and essentials were left to Congress, which could at will alter, amend, or create new methods or permit the States to enter into compacts with each other to attain the same end. This permission given the States to enter into such compacts was inevitable. The procedure set forth under the congressional act (U. S. C. A., Title 18, section 662; R. S. 5278) necessary to effect rendition of interstate fugitives from justice proved cumbersome, uncertain and in instances ineffective. While a duty rested upon the executive authority of the asylum State, under proper rendition proceedings, to deliver up the fugitive to the demanding State, there was no method of its enforcement.

Mahon v. Justice, supra, page 715;
Taylor v. Taintor, 83 U. S. 366, 374;
Kentucky v. Dennison, 24 How. 66.

In giving Congress the authority to prescribe the procedure in rendition proceedings under the Federal Constitution, it must be assumed the authority granted embraced all necessary means to make effective the objects of the constitutional provision, and that the consent legislation, aside from its authority under Article I, Section 10, Clause 3, of the Constitution, was within the contemplation of the constitutional rendition provision.

The petitioner is a fugitive from justice, being a parolee whose parole has been revoked. Under such circumstances no warrant of arrest is essential under the rendition laws.

Ex parte Foster, 61 Pac. (2d) 37, 39;
Brown v. Lowry, 195 S. E. 759 (Ga.);
In re McBride, 101 Cal. App. 201, 256.

And the question as to the merits of the revocation of his parole is a matter for the courts of the State of Washington to decide.

Ex parte Foster, supra.

CONCLUSION.

Due to the uncertainties and delays occasioned in the interstate pursuit of criminals under the rendition laws of the United States, there has been considerable agitation for a more effective method to attain this end, in which Congress has given encouraging legislation. It has been the subject of considerable discussion in collegiate periodicals and as a result a uniform act was formulated for adoption by the States, designed to accomplish more effective super-

vision of out-of-state parolees. This act prior to 1940 was adopted by the legislatures of some twenty-nine States, including the State of California, which adopted it in 1937, and which act is here under attack by petitioner. A review of the constitutional provision, with respect to interstate rendition of fugitives from justice, does not warrant the conclusion it is exclusive, nor did the congressional legislation enacted thereunder lead to any such inference. However, in addition to the grounds assigned in our brief, the constitutionality of the congressional act may be supported under the police powers of Congress in interstate commerce, for the purpose of making more effective the penal laws of the various States. (*Brooks v. United States,* 267 U. S. 432, 426.)

It is submitted the petition for writ of certiorari herein should be denied.

Dated, San Francisco, California,
December 1, 1941.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1941

No. 713

JOE TENNER,
Petitioner,

vs.

CHARLES W. DULLEA, Chief of Police of the City and County of San Francisco,
Respondent.

REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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REPLY OF PETITIONER TO BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Pursuant to the provisions of Subdivision (a) of Section 4 of Rule 38 of this Honorable Court, we respectfully ask consideration of this reply to the brief filed by the Attorneys-General of the States of California and Washington in opposition to the petition for a writ of certiorari to the Superior Court of

the State of California in and for the City and County of San Francisco to review a final judgment and decree of that Court denying a writ of *habeas corpus,* to petitioner, who was admittedly restrained of his liberty by respondent solely by virtue of a statute of the State of California which purports to create a compact with the State of Washington by the terms of which officers from either state are authorized to enter the other, and take any person on parole, without any extradition proceedings or any judicial hearing, without any warrant or process, and without any right of appeal to the Courts of the state in which such person is domiciled.

I.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL.

In our petition we pointed out what should be apparent at first blush,—that this statute or compact, or by whatsoever name it may be called, is a violation of the provisions of Article II, Section 2, Clause 2, of the Constitution of the United States and the Act of Congress of 1793 (U. S. C. A., Title 18, Sec. 662), because it attempts to dispense altogether with the requirements of extradition proceedings as they have existed for a century and a half. Counsel for respondent concede (page 14 of Respondent's Brief) the correctness of the statement contained in the petition that interstate extradition or rendition is not a matter of comity but of strict law.

People ex rel. Corkran v. Hyatt, 172 N. Y. 176, 64 N. E. 825, affirmed in

Hyatt v. New York, 188 U. S. 691, 47 Law. Ed. 657.

Indeed, it would have been futile to have contended otherwise, for state and federal Courts have held signally and emphatically that the executive authority of a state has no power to render up an alleged fugitive to another state for the mere asking, and that one domiciled, or even found in one state cannot be extradited unless the provisions of the Act of 1793 are complied with. To authorize extradition it must appear that the accused is substantially charged with a crime in the demanding state by an indictment of a grand jury or an affidavit laid before a magistrate charging him with a crime against its laws, that he was physically within the demanding state at the time the crime was committed,—for one cannot be a fugitive from a place where he has never been,—and that he has fled from justice within the meaning of the Constitution, which means that after the commission of the crime he of his own volition departed from the demanding state, for he does not flee if he is taken thence by force. (See *In re Whittington,* 34 Cal. App. 344, 167 Pac. 404.)

The presence of these elements and compliance with this procedure have long been recognized as absolutely essential:

> "The governor of this state was not authorized to issue his warrant for the arrest of the petitioner, unless it was shown to him that the petitioner is substantially charged with a crime in the demanding state * * * And whether the alleged fugitive is so charged with a crime is a

> question of law which is always open, upon the face of the papers, to judicial inquiry, on an application for discharge under a writ of *habeas corpus.*"
>
> *Ex parte Spears,* 88 Cal. 640, 26 Pac. 608.

In that decision, as also in the very learned opinion of the Oklahoma Court of Criminal Appeals in *Ex parte Owen,* 10 Okl. Cr. 284, 136 Pac. 137, it was held that an affidavit, not made on oath certain, but merely on information and belief, was not a compliance with the act of Congress. In the latter case it was likewise held that the affidavit could not be sworn to before a notary public, who was not a magistrate,—and in each case the petitioner was discharged on *habeas corpus.*

Yet what the Courts have always held that the state may *not* do, it is now contended by respondent that the state *may* do, nay, more, that it may dispense altogether with extradition requirements and procedure because of the act of Congress of June 6, 1934. (U. S. C. A. Title 18, Section 420.) This is no overstatement, because if the state may waive extradition procedure in the case of an alleged parole violator who came within its borders (as Tenner did) with the permission of the sending state, it may likewise do so in the case of all persons charged with crime in other jurisdictions. It may even surrender those merely *suspected* of crime, if respondent is correct.

The answer is that the act of Congress does not *say* that the state may dispense with extradition requirements in *any* case. It certainly does not say so specifically. Is this Court to hold that it says so by *implica-*

tion? Is one to be deprived of liberty by implication? Will this Court pronounce the justly reprobated doctrine of repeal by implication? Or will it amend the Constitution by implication? We think not.

But in any event, is it not absurd to say, as the learned Attorneys-General have said, that these are not *substantial* federal questions?

II.

THE CLAIM THAT PETITIONER HAS NOT EXHAUSTED HIS REMEDY IN THE STATE COURTS IS WITHOUT MERIT.

Relying upon *Mooney v. Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791, 98 A. L. R. 406, respondent's counsel raise the contention that petitioner has failed to exhaust his remedy in the state Courts, and, not having done so, will not be heard here for the present. In that case the petitioner, raising matters discovered since his trial and conviction, petitioned this Court in an original proceeding in habeas corpus, on the ground that the state had procured his conviction by perjured testimony connived at by the District Attorney. This Court, as then constituted, held that he should first seek redress in the state Courts. The case here is patently distinguishable from *Mooney's* case (1) because here the sole question presented is indisputably one arising under the Constitution and laws of the United States, the challenged statute of the state being assailed as invalid under the organic and statutory federal law; and (2) because in the instant case, a final decree has been passed by the state Court

from which there is no appeal. That in such case the party aggrieved may present his complaint to this Court is well settled, because, as said in *Kentucky v. Powers,* 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633:

> "This must be so, else it would be in the power of a state so to regulate the jurisdiction of its courts as to prevent this court from protecting rights secured by the Constitution and improperly denied in a subordinate state court, though specially set up and claimed."

However, the contention is decisively answered in the opinion handed down on the 24th of last month by this Court in *Edwards v. California* (No. 17, October Term, 1941), in which this Court entertained a direct appeal from the Superior Court of California, and held unconstitutional a state statute. There was there, as here, no appeal from the judgment of the Superior Court, but the appellant might have applied to the District Court of Appeal or to the Supreme Court for a writ of *habeas corpus.* Earlier cases in which this Court entertained writs of error to subordinate state tribunals are cited in *Kentucky v. Powers,* supra, and see cases cited in U. S. C. A., Title 28, Section 344, note 32. Moreover, the rule laid down in *Mooney's* case is based merely on considerations of "orderly procedure", and a mere rule of practice should never be permitted to override a constitutional right. (See *Agnello v. United States,* 269 U. S. 20, 46 S. Ct. 4, 70 L. Ed. 145, 51 A. L. R. 409.)

III.

THE FEDERAL QUESTION WAS PROPERLY RAISED.

The Attorneys-General do not point out wherein the federal questions were insufficiently raised. They are specifically set up in the exceptions to the return to the writ of *habeas corpus* where it was clearly called to the attention of the state Court that petitioner was held in violation of Article II, Section 2, Clause 2 of the Constitution and of the Act of Congress of 1793 because no extradition proceedings in accordance with that act were pending against him. The certificate of the judge of the state Court removes any possible ambiguity, and it is "elementary that such a certificate may serve to elucidate the determination whether a federal question exists".

Rector v. City Deposit Co., 200 U. S. 405, 26 S. Ct. 289, 50 L. Ed. 527.

Dated, San Francisco, California,
December 3, 1941.

Respectfully submitted,
WILLIAM KLEIN,
WILLIAM F. HERRON,
Attorneys for Petitioner.

Due service and receipt of a copy of the within is hereby admitted

this.....*day of December, 1941.*

.....

Attorney General of the State of California,

.....

Deputy Attorney General of the State of California,

.....

Attorney General of the State of Washington,

.....

Special Assistant to the Attorney General of the State of Washington,

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